IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN OIL CONSOLIDATED, a corporation, WALTER P. FRICK, JOHN F. CARLSTON, CLARENCE J. BERRY, DENNIS SEARLES, WALTER H. LEIMERT and WICKHAM HAVENS,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 2789

BRIEF IN BEHALF OF APPELLANTS.

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This is an appeal from an order appointing a Receiver. The facts are undisputed. The affidavits filed by the government not only do not contradict appellants' showing, but in material particulars they support and corroborate it. Appellants insist that it follows as a conclusion of law from the uncontradicted facts that they have a right to possess and extract oil from the land in controversy.

The ultimate facts in the showing before the Court constitute substantially the proofs that will be made upon the trial of the case. The determination of the questions of law involved upon this appeal will therefore amount practically to a disposition of the case upon its merits.

There are ten producing wells upon the said property. More than nine hundred thousand dollars is shown to have been expended by appellants in the development and improvements thereon. In addition to this outlay it also appears that the appellant corporation has paid on account of the purchase price of this property an amount in excess of half a million dollars (Tr., pp. 78-80).

THE QUESTION OF LAW INVOLVED.

The Government does not assert that the locations under which appellants claim were made by "dummy" locators.

The complaint proceeds upon the theory that these lands were withdrawn from entry by President Taft's withdrawal order of September 27, 1909, and that appellants have no rights which are preserved by the Act of June 25, 1910, known as the Pickett Bill.

The position of appellants is that their rights were unaffected by the said withdrawal order; they insist that the locations under which they claim were "valid and existing" at the date of said order and were there-

fore excluded from its general provisions by the following words thereof:

> "All locations or claims existing and valid on this date may proceed to entry in the usual manner after filing, investigation and examination."

Appellants do not claim that any discovery of oil had been made on any part of said land at the date of said withdrawal order. The President's language does not require (and we insist that it was not intended to mean) that a location or claim to be "valid and existing" must have been already perfected by a discovery of oil or gas.

It is furthermore appellants' contention that if it be the meaning of said withdrawal order that all claims unperfected by discovery are thereby destroyed, the facts here are such that they nevertheless bring these locations within the protection of the following proviso of the Act of June 25, 1910, commonly known as the Pickett Bill:

> "Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

In the following pages the two propositions upon which appellants thus rely will be discussed in their order:

I.

THE RIGHTS OF APPELLANTS AS MEASURED BY THE TAFT WITHDRAWAL ORDER.

SYLLABUS OF THE DISCUSSION ON THIS POINT.

At the date of the Taft withdrawal order—September 27, 1909—neither of the four locations in controversy had been perfected by discovery of oil. But the Pioneer Midway Oil Company, the grantee of the original locators, was on said date in actual physical possession of the said four claims. It had already erected upon each of them the very derrick with which a well was subsequently drilled; it had purchased and hauled to the site of the derricks two boilers for use in drilling for oil; it had sunk a hole to a considerable depth in a search for the water necessary for drilling for oil; it had erected cabins suitable for housing the drilling crews; and on the date that said order was made it had a crew of men at work upon the several claims preparing the ground for the installation of drilling plants and had expended several thousand dollars in the course of these various activities.

Appellants insist: (1) That upon the foregoing facts a Court, if called upon on said 27th day of September, 1909, would have been legally bound to protect the possession of said Pioneer Midway Oil Company against any form of hostile entry or intrusion, even if the purpose of such entry had been to effect a location of said lands under the permissive provisions of the mineral laws of the United States.

(2) That any location or claim which the courts would thus have recognized and protected on said date was a valid and existing claim or location within the meaning of President Taft's words. A location or claim of a character so substantial that the courts would thus recognize and protect it could not properly be said to be either without existence or validity. That the President did not intend to strike down such claims.

(3) As thus interpreted, the order is consistent, just, and conscionable. An interpretation which would narrowly confine the phrase to such claims only as had been perfected by discovery at said date would at once do violence to the accepted usage of the language employed by the President and would render the order grossly inequitable, while at the same time it would deprive the words employed of any force and effect not already implied; for no one has ever supposed—and no lawyer of President Taft's recognized learning and ability would ever suppose—that the vested rights of the owner of a mining location perfected by discovery could be taken away from him either by an act of Congress or by a Presidential order.

Appellants and their predecessors, pursuant to the permission expressly extended to them in the said withdrawal order, proceeded in good faith to perfect and did perfect their said claims. Discoveries of oil were made thereon several years prior to the filing of plaintiff's bill. Vast sums had been expended in their exploration and development when this suit was brought. Upon the uncontradicted showing, these properties have never been affected by the said withdrawal order. The rights of appellants are vested rights and the Government having shown no right, legal or equitable, to disturb appellants' possession, it was error to appoint a Receiver.

It is essential at the outset of our discussion to determine the correct meaning and intent of the phrase "all locations or claims existing and valid at this date" which President Taft employed in his withdrawal order of September 27, 1909. Said order is worded as follows:

> "In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public do-

> main, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after filing, investigation and examination."

Are the words "all locations or claims existing and valid at this date" to be confined solely to locations or claims which at said date had already been perfected by discovery?

Or does this phrase embrace all locations or claims not then perfected by discovery, but which nevertheless had been initiated by location notices and which were attended on said date by the actual physical possession of the land claimed, accompanied by diligent effort and outlay looking to a discovery of oil thereon?

That the phrase was intended to exclude and does exclude from the omnibus withdrawal, locations or claims of the latter class we respectfully insist is entirely clear. While such locations or claims could not properly be said to be perfected until an actual discovery, they nevertheless were recognized as having an existence and validity which entitled the diligent locator in actual possession to protection against all manner of hostile intrusions. They were claims of a substantial character. The extent to which they were treated as valid and existing locations or claims is illustrated by the following quotations:

As long ago as 1881 Justice Miller said in *Crossman* v. *Pendery,* 8 Fed. Rep., 693, 694:

> "The plaintiffs might have protected their actual possession of their entire claim by proper legal proceeding prior to the discovery of mineral by the defendants, or by either party.
>
> "A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral."

In *Rooney* v. *Barnette,* 200 Fed. Rep., 700, 710, the United States Circuit Court of Appeals for this Circuit said:

> "It is objected to this location that Hastings, the original locator, made no discovery on the claim, and without a discovery Hastings had nothing to convey to Stafford, and that Stafford had, therefore, no right of possession. This objection cannot be sustained, either upon the fact or the law. . . .
>
> "As to the law: The location of mineral ground gives to the locator before discovery, and while he complies with the statutes of the United States and the state and local rules and regulations, the valuable right of possession against all intruders, and this right he can convey to another."

In a recent California case the District Court of Appeals of the Second Appellate District said:

> "The argument of the plaintiff that the title of the defendant under mining location merely, without discovery of minerals, was totally invalid and of no effect, is true only in a qualified sense. This title by such location and possession was good as against every person contending against it, except the paramount power, to wit: the government of the United States. Had the plaintiff, being vested with whatever right the defendant held as to the land, gone upon it and proceeded to prosecute work with the view to making a discovery of oil, his possession could

not have been disturbed by strangers. . . It cannot be said that the rights which the defendant purported to clothe the plaintiff with were of no value at all."

Hullinger v. *Big Sespe Oil Co.,* 28 Cal. App., 69, 73.

In a leading California case it is said:

"One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession."

Miller v. *Chrisman,* 140 Cal., 440, 447.

No one will doubt that in proper usage the terms "location" and "claim" embrace within their meaning claims which have not been perfected by discovery, as well as those which have. A glance at the foregoing quotations shows this. Similarly, this Court has said (italics ours):

"Appellees could not at that time have acquired any title to the lands included in their *locations.* The discovery of mineral was essential for that purpose, but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had *located.* They claimed it to be mineral and were diligently at work to prove it to be such."

Cosmos, etc. Co. v. *Gray Eagle Oil Co.,* 112 Fed. Rep., 4, 14.

If it is sought to confine the words "location or claim" to such only as have been perfected by discov-

ery, the restrictive adjective "perfected" or its equivalent is properly used, as witness the following:

> "There is some force in the suggestion that the act relates only to *perfected claims*. That is, to those upon which a discovery has already been made. . . . If a discovery had previously been made upon the unoccupied contiguous *claim* . . . there might be a discovery sufficient to perfect the *location*."

Smith v. *Union Oil Co.*, 166 Cal., 217, 224.

It is beyond debate, therefore, that, according to the accepted usage of the language, a location or claim may "exist" without a discovery. It is equally clear from the foregoing authorities that prior to discovery, such a claim, if attended with possession and proper diligence, may, without straining the English language, be called a *"valid"* location or claim. Such a location does not, of course, give to the claimant a vested right in the land as against the Government, The Government acting through either the President or Congress has the power to withdraw such land from entry at any time prior to discovery, however harsh or tyrannical the arbitrary exercise of such a power might be. But there is an obvious distinction between a location or claim which is valid and existing so far as the rights of private individuals are concerned, though not binding upon the Government, and a *perfected* location or claim which the Government cannot take away from the unwilling citizen short of the exercise of the power of eminent domain.

OUR INTERPRETATION SANCTIONED BY JUDICIAL DECISION.

No appellate tribunal, so far as we are aware, has heretofore been called upon to place an interpretation upon the language used by President Taft. The question arose directly, however, upon the application for the appointment of a receiver in an important case in the Southern District of California. Judge Bledsoe rendered a carefully considered opinion wherein he gave to President Taft's phraseology an interpretation squarely in accord with our contention. Judge Bledsoe said:

> "Special pains were taken to indicate that the intention of the executive was that only *'valid'* locations or claims were to be excepted from the general operation of the withdrawal order. In order to ascertain the extent of this exception it is necessary to define what, under the law, and within the meaning and true intent of the Presidential action, constitutes a 'valid' location or claim."

After reviewing the authorities and pointing out that prior to discovery the locator has no vested right as against the Government, the learned Judge says:

> "Having, however, initiated his claim, by the posting of his notices, he is protected as against third persons, as long as he 'remains in possession and with due diligence prosecutes his claim toward a discovery.' As long as he thus conducts himself, though as against the government he has no vested rights, nevertheless, he has rights which ought to be by all parties respected.
>
> "And, in this spirit, all locators who were thus conducting themselves at the time of the making of the withdrawal order, had their rights respected by the President by the exception contained therein, and hereinabove referred to. That is to say, on the date that the withdrawal order was made, if any locator was then on withdrawn lands, in

possession, and was 'with due diligence' prosecuting his work toward a 'discovery of oil,' by the express provisions of the withdrawal order, it did not affect him. He had a 'valid' location, and he could, despite the general terms of the order, 'proceed to entry in the usual manner,' that is, proceed to a discovery and thereby perfect his right to the mineral claim. If, however, at the date of the withdrawal order such locator was not in possession, or was not with 'due diligence' prosecuting his work toward a discovery, then he had no 'valid' location, and in virtue of the efficacy of the withdrawal order as an act of a duly authorized agent of the United States government in that behalf, the order served to withdraw from further entry, location, settlement, or other disposal, the land so claimed by such locator. . . . If discoveries of oil were made subsequent to the withdrawal order in virtue of claims initiated, however, prior thereto, and if at the time of the making of such order the locators or their successors were in occupation of the property claimed, and were at that time diligently engaged in the prosecution of the work looking to a discovery of oil therein they would be protected in their rights by the express terms of the withdrawal order itself."

U. S. v. *McCutcheon, et al.,* Equity Suit A-12.

(The foregoing excerpts from the opinion of Judge Bledsoe will be found set forth in his opinion, which is copied substantially in full as an appendix to the brief filed by the Government in this Court in Appeals No. 2660, entitled *"El Dora Oil Company, et al.* v. *United States of America."*)

UNLESS SO INTERPRETED PRESIDENT'S WORDS EFFECT NO USEFUL PURPOSE.

We have seen that Judge Bledsoe's interpretation of the President's language is in accord with the accepted usage of the President's words. Another very persuasive reason for this interpretation is that unless the words in question are held to include claims or locations valid and existing as between rival claimants,

but unperfected by discovery, the President's phraseology has no necessary place in his order of withdrawal. No Chief Executive, much less a lawyer of President Taft's recognized learning and ability, would suppose that such an order could interfere with or divest the vested rights of the owner of a perfected claim. The claimant whose location was perfected needed no words of protection; he was already amply protected by the Federal Constitution.

> "As said in *Belk* v. *Meagher,* 104 U. S., 279, 283: 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government."
>
> *Sullivan* v. *Iron Silver Mining Co.,* 143 U. S., 431, 434.
>
> "When a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession."
>
> 152 U. S., 505, 511.

It would therefore have been a mere idle and useless formality for the President to have expressly excepted perfected claims in his order. But the same cannot be said of the very large class of locations and claims whose owners had prior to said date, in good faith, and with the consent of the Government, entered into actual possession, and who had upon the faith of the Government's promises of title, expended much labor and money in a diligent effort to accomplish a

discovery of oil. The unhappy plight of locators so situated, if the President failed to protect their claims, is evidenced by the following quotation (italics ours):

> "But it is always to be borne in mind that until the perfection of the inchoate location by discovery, the locator has no vested rights which Congress is obliged to recognize. So that Congress may change its policy in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. **However inequitable such a proceeding might be,** it in no way would be illegal."

Miller v. *Chrisman,* 140 Cal., 447.

What Congress might do in the way of withdrawing lands from entry the President also could lawfully do —as we now know from the decision of the United States Supreme Court in the Midwest Case. That President Taft did not wish or intend to treat such locators and claimants in a manner which a court could properly characterize as "inequitable" we conceive not to be open to doubt or debate. In view, therefore, of the fact that there was every moral reason to insert such a clause for the benefit of persons holding with due diligence claims then unperfected by discovery, and no legal occasion appearing for expressly saving the vested rights of the owners of perfected claims, it is proper to conclude that the *primary* purpose of the President in inserting his words of exception was to protect claimants of the former class.

THE INTERPRETATION INSISTED UPON IS OBVIOUSLY JUST.

But perhaps the most potent and convincing argument of all in favor of the interpretation which we are contending for rests not so much in the niceties of language and law already pointed out, as upon the inherent equity and justice attending such a construction. At the very least, it must be conceded that the President's order is susceptible of the more generous interpretation. And since it renders the order just and equitable it should obviously be given the preference over an interpretation which would convict the government of the United States of harsh and unconscionable conduct toward a very considerable number of its citizens and subjects.

A distinguished judge of this Honorable Court has said:

> "No good reason can be offered why the United States in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. . . . When matter of estoppel arises, the observance of honest dealings may become of higher importance than the preservation of the public domain. It was well said in *Woodruff* v. *Trapuall,* 10 How., 190, that we naturally look to the actions of a sovereign state to be characterized by more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

U. S. v. *Land Wagonroad Co.,* 54 Fed., 807, 811-12 (per Gilbert, J.).

The foregoing principles should be in mind, we submit, when the President's order is up for interpretation. The situation existing in the oil fields of California on the day that this particular order of withdrawal was made is matter of common knowledge. On that date, both within and without the boundaries of the lands affected by the withdrawal, many millions of dollars had been expended in good faith in diligent efforts to perfect locations by a discovery of oil. In some districts within the United States, and even in California, nature had been sufficiently gracious to place her oil deposits but a few feet below the surface. In the very valuable Midwest Oil Field of Wyoming, for instance, discoveries were made and claims perfected by sinking with relatively inexpensive appliances to a depth of but fifty feet. There the necessary machinery could be installed and a discovery successfully and easily made within the period of a few days or a week. Substantially similar conditions existed in some parts of California. But in other districts, notably in the territory covered by the withdrawal order here in question, it was frequently necessary, in order to accomplish a discovery, to sink at enormous cost, and by very slow and laborious processes, to a depth often exceeding half a mile. It was not infrequently the case that the actual outlay upon a single incompleted well had already mounted at the date of the President's withdrawal order far into the thousands. Instances are not unknown where upwards of

one hundred thousand dollars, or even more, had at that date been expended upon a single well without any discovery having then been made. Where the owners or claimants were guilty of no acts evidencing an abandonment of their claims,—where in good faith and with proper diligence and at the invitation of the Government they had expended their money and proceeded with their work,—it requires no argument to satisfy the mind of a Chancellor that it would have been grossly unjust, oppressive and immoral if the Government, having long held out the promise of title to these locators or claimants, had suddenly changed its policy, and had with a stroke of its President's pen, confiscated the labor, the permanent improvements, and perhaps the entire fortunes, of such claimants.

If an individual with the expectation of improving his wealth and prosperity thereby,—for the mining laws were intended to enhance the national wealth and prosperity,—had held out a promise of title to his neighbor and had induced efforts and expenditures of like character, it is inconceivable that any court guided by principles of ordinary morality would not have held such person estopped to deny to his neighbor the fruits of his outlay and toil. If the conduct to be expected of the Government rests, as Judge Gilbert has fittingly observed in the quotation above set forth, upon even a higher plane than that which we may assign to mere individuals, there is no room for an interpretation of an order of the nation's Chief Ex-

ecutive which would be consistent only with the atrocious doctrine that "might is right."

We most respectfully submit that this executive withdrawal is worthy of its distinguished author and of this nation, only in the event that its commands are just and equitable. Unless forced thereto by unambiguous language, the Federal Courts, we insist, ought never to consent to an interpretation which would convert this order into an exhibition of arbitrary and despotic power shocking to the conscience.

It follows from the foregoing discussion that the Taft order excludes from the general withdrawal all claims which at its date were held in actual physical possession, provided that in addition to such possession the claimant was using a proper amount of diligence to accomplish a discovery of oil.

THE RULE BY WHICH TO DETERMINE WHETHER A CLAIM IS "VALID AND EXISTING."

It also follows from the authorities already quoted that the test of the sufficiency of the acts alleged to constitute such due diligence is this: **Would a Court upon the facts as they existed on September 27, 1909, have felt itself obligated to protect the claimant's possession from hostile intrusion?**

THE DILIGENCE REQUIRED OF A LOCATOR TO ENABLE HIM TO HOLD POSSESSION OF HIS CLAIM AGAINST A HOSTILE ENTRY.

The conclusion that the same degree of diligence which would protect the possession of the claimant

against hostile intrusion will likewise bring his claim within the saving clause of the Taft withdrawal order, makes it proper that we next examine the adjudicated cases for the purpose of ascertaining what showing of diligence will entitle such a claimant to the protection of the courts.

The general principles applicable wherever diligent pursuit of any enterprise is called for, are set forth in the following authorities (in all quotations in this brief the emphasis is ours):

> "Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking.' *The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself.*"
>
> *Ophir Silver Mining Co.* v. *Carpenter,* 4 Nev., 535, 546-7.

The case just quoted is undoubtedly the leading authority on the question of diligence, and has been everywhere accepted as declaring the general principle wherewith to test the sufficiency of a claimant's showing. Among the cases wherein it is cited are cases dealing with claimants to oil lands.

See

United States v. *Midway Northern Oil Co.*, 232 Federal, 626;

United States v. *McCutcheon, et al.* (Equity suit A-12; printed in the Government's brief in this Court in Appeal No. 2660; see p. 72 thereof).

Another comprehensive expression of the general rule is that laid down by the Supreme Court of Washington:

> "An examination of the decisions of the courts will show that the question of due diligence on the part of an appropriator in performing work following his notice of appropriation must rest largely upon the facts and circumstances of each particular case. The conditions and necessities of different projects are so varying that it is difficult to make more than a very general statement of a rule of diligence applicable to all cases. Probably as comprehensive a general statement of the rule as the law will warrant is that found in the text in 40 *Cyc.*, at page 711, as follows: 'The appropriator must proceed with reasonable diligence to construct and complete such works as are necessary for the immediate application of the water to the intended use. What is a reasonable time and what constitutes reasonable diligence must depend largely on the facts of the particular case, . . . but it may be said that they depend chiefly on the physical circumstances of the locality, the nature and condition of the region to be traversed and its accessibility, the length of the season in which work is practicable, the supply of labor, and the magnitude and difficulty of the works necessary.'"

State v. *Superior Court,* 126 Pac., 945, 953.

So much as to the general principles which control the question. We will now refer to the oil cases thus

far decided in which the courts have dealt with the sufficiency of the showing of diligence to justify the occupant in retaining possession of his claim. These cases are of two classes—those which have no relation to the Taft withdrawal order, and one case which is concerned therewith. We will first refer to cases of the former class:

THE DILIGENCE REQUIRED IN CASES BETWEEN PRIVATE INDIVIDUALS.

In *Weed* v. *Snook,* 144 Cal., 439, it was held that the showing of diligence was such that it entitled defendants to possession as against a hostile locator. The defendants claimed under a location notice posted by them on June 20, 1900. On November 28, 1900, their lessee "went into actual possession and began the active "work of *preparing* to drill a well thereon for the "discovery of oil." On December 24, 1900, before the lessee commenced its work of drilling upon the location, and while it was erecting its buildings, derricks, and machinery thereon, the plaintiffs entered and located the claim. On this state of facts the Supreme Court said:

> "The plaintiffs attempted to locate while defendants were in possession and actively preparing to drill a well. As to the time that elapsed between the date of defendants' location and November of the same year and the reasons why defendants were not actively at work trying to discover oil during all of said time, it is not necessary here to inquire. *As to plaintiffs, it is sufficient that defendants were so in possession and actively at work when they attempted to locate.*"

The Court in said case also quotes with approval the following language from *Kern River Oil Co.* v. *C. W. Clark,* 30 Land Dec., 550:

> "But where the locator is in possession under his location, *and is actively at work through his lessees or otherwise, and expending money for the purpose of discovering oil,* his rights cannot be forfeited to third parties who attempt to make locations under such circumstances. The law must be given a liberal and equitable interpretation with a view of protecting prior rights acquired in good faith."

In *Borgwardt* v. *McKittrick Oil Co.,* 164 Cal., 651, 655, it appears that defendants claimed under a location notice posted on September 19, 1899. More than eight years later, in April, 1908, defendant's Board of Directors voted to order the timber for a rig with which to drill a well on said location. On May 23, 1908, defendant commenced the overhauling and repairing of a water pipeline to be used for drilling the proposed well. On May 28, 1908, defendant brought to the claim certain timber for the construction of their rig and deposited the same thereon, following this with rig lumber on the next day. They also placed the property in possession of an employee. Nothing further appears to have been done prior to the commencement of the suit.

It appears that plaintiff's agent had posted notices of location on May 26, 1908, at a time when no one was in actual physical possession of the land. On that day plaintiff's agent was physically upon the properties. On May 27, 1908, he departed, leaving a man

in a cabin nearby with directions to get two or three other men to watch the claim and stay on the ground. The agent returned to the land on May 29, 1908, with a surveyor to run the lines and found the timber above referred to upon the ground with the said employee of defendant occupying the cabin. The Court said, page 658:

> "We do not think that the evidence was of such a nature as to show any voluntary abandonment of this location by defendant."

It will be noted that the sole activity of the plaintiff, in said action, apart from posting the location notice, had consisted in placing men in a cabin on an adjoining tract of land, with directions to watch the land and walk over it once or twice a day. The Court says of the effect of these acts:

> "Whatever may be said as to this as being capable of sustaining a finding of actual possession, it is clear that the evidence is not sufficient to support the finding substantially to the effect that plaintiffs were engaged in the prosecution of discovery work at any time prior to the entry by defendant."

Borgwardt v. *McKittrick Oil Co.,* 164 Cal., 651, 660.

Another case indicative of what is sufficient diligence to hold a claim is *McLemore* v. *Express Oil Co.,* 158 Cal., 559: A location notice was posted by defendants in June, 1906. A cabin was constructed upon the claim, its boundaries marked, and some bits of road

built. This had been done upon the theory that it was assessment work. On April 12, 1907, a homestead claimant settled on the land. At that time no work whatever was being prosecuted on the claim. The locators, as the Supreme Court says:

> "were not only not in actual possession of the land, as the court finds, but the evidence discloses that what they had done was no more than to attempt to hold the land upon the theory that assessment work was adequate for that purpose. It is shown by the evidence that they were not only not engaged in the diligent prosecution of the work, but that they were not financially able so to prosecute it, and were either in search of capital to enable them to do so, or in search of a purchaser to buy out such interest as it might be thought that they had."

Upon the facts presented the Court also has this to say:

> "This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end."
>
> *McLemore* v. *Express Oil Co.*, 158 Cal., 551, 563.

The foregoing language is quoted by the Supreme Court of California in the later case of *Borgwardt* v. *McKittrick Oil Co., supra,* and the Court makes the following observations:

> "Under the rule established by the decisions the locator is protected in his possession only when engaged in the diligent prosecution of actual work for a discovery,

> and the commencement and continuance of such work are as essential when he complains of interference with his possession, as is the posting of his notice of location. **We do not mean to hold that such diligent prosecution of work may not include such actual preparation for the same as the bringing to the claim of the materials necessary therefor.** We have no such situation presented by the evidence here, and need not determine exactly what will constitute the diligent prosecution of discovery work. . . . The attempting locator's possession is protected only while **he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work."**

Borgwardt v. *McKittrick Oil Co.,* 164 Cal., 650, 661.

In the still later case of *Smith* v. *Union Oil Co.,* 166 Cal., 217, the facts were as follows:

A location notice was posted on February 5, 1910. The locators immediately took possession, and with the exception of the period from August 17th to August 31st, 1910, during which the land was vacant, the ground had been occupied by the locators and those claiming under them. The trial court found that upon the 7th day of October, 1910, the lessee:

> ". . . went upon said placer mining claim, made a location for a well thereon, purchased the lumber that was on the claim, and proceeded to build a wood rig, bunk-house, cook-house, as well as purchase rig irons for the standard oil well drilling rig, and expended more than two thousand ($2,000.00) dollars."

(See Trans. of Record on Appeal in said case, p. 42.)

The complaint was filed on November 25, 1910. At that time, according to the evidence of the lessee, the extent of the work done was as follows:

> "I paid for the lumber that was on the property and had the rig builder go on and proceed to build a rig, houses;—that is bunk-house and cook-house, and paid for building these structures. I also bought rig irons from the National Supply Company, for a standard drilling outfit, there on the property. All of which was moved onto the property at my expense, and I have had someone on the property at all times since the early part of October, to look after it. Since I went on the property in the early part of October, I have spent there more than $2,000."

ibidem, pp. 73-4.

Another of plaintiff's witnesses testified:

> "I saw and was on this property just prior to the filing of the complaint in this action. At that time there was the greater portion of a standard drilling rig, part of it erected, on the property, and the bunk-houses and cook-house. Captain Stowe's representatives were in possession. I was on the property with Captain Stowe. He was preparing to get his well in shape to drill, the derrick up, giving instructions to his men. I was present when he did so."

ibidem, p. 64.

Such was the showing of diligence. The trial court rendered judgment in favor of plaintiff and enjoined the defendant from entering upon the claim. In affirming this judgment the Supreme Court said:

> "On October 7th, 1910, the lessee of plaintiff took possession and began work thereon preparatory for the drilling of a well thereon for the purpose of finding oil therein,

> which work *he has diligently prosecuted.* At the date of the beginning of this action, November 25, 1910, he had expended some two thousand dollars in said work."

Smith v. *Union Oil Company,* 166 Cal., 217, 219.

In *Cosmos* v. *Grey Eagle Oil Co.,* 112 Fed. Rep., 4, 14, this Court of Appeals was concerned with a contest between a claimant under an oil location and a claimant under a forest lieu selection. The Court said that the oil claimants "were diligently at work" to prove their claim to be oil bearing. The facts upon which this Court based this conclusion were found in certain affidavits filed by appellees on a motion for injunction and were as follows:

The location notice was posted on January 11, 1899. The locators went into possession immediately. On or about July 1, 1899, they dug a prospect shaft to a depth of sixty feet. They were then enjoined from proceeding with this work, *but the injunction was dissolved within the same month.* It is to be particularly noted that no drilling plant was placed upon the property until some six months later in January, 1900, In the meantime, on December 9, 1899, the plaintiff's predecessor attempted to select the land as forest lieu. This delay in beginning drilling operations does not appear to have impressed this Court as unreasonable, for the Court says:

> "From the allegations of the bill it appears that at the time of appellants' selection of the lands in question

no discovery of any mineral had been made. Appellees could not at that time have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose, but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral *and were diligently at work to prove it to be such.*"

A CASE INVOLVING "DUE DILIGENCE" IN RELATION TO THE TAFT WITHDRAWAL ORDER.

In *United States* v. *George W. McCutcheon, Obispo Oil Company,* et al., Equity suit No. A-12 (Southern District of California), Judge Bledsoe, as we have already seen, gave to the Taft withdrawal order the meaning which we are here pressing upon the Court. Having reached the conclusion that the Obispo Oil Company, one of the defendants, was entitled to its claim if as matter of fact it was using due diligence in the prosecution of work on the 27th day of September, 1909, the learned Judge proceeded to measure the facts before him with the rules of due diligence applicable to controversies between individuals. He also was called upon to interpret the phrase of the Pickett Bill which would have entitled the said Obispo Oil Company to possession if it could properly be said that said corporation was "in diligent prosecution of work leading to discovery of oil or gas" at the date of the withdrawal order.

The facts in that case were these: The said Obispo Oil Company had entered upon its claim on March 1, 1909, and was diligently engaged in drilling for oil on

said property until some time in the month of July, 1909. It had expended many thousands of dollars. It had then exhausted all of its available funds and the work of drilling was stopped. By August 5th—over seven weeks before the Taft withdrawal order was made—it had discharged its crew, had shut down the well, and left the property in charge of a keeper. A short time thereafter this man was displaced by another man whose work was upon an adjoining piece of property but who moved into a house on the property claimed by the Obispo Oil Company and lived there rent free, simply "to hold it for the company." The Obispo Oil Company never resumed work. Nothing further was done upon the property in the way of work until the following February, 1910, when the successor of said corporation began operations. The sole reason why the Obispo Oil Company stopped work was lack of funds. The case is undoubtedly a hard one, but Judge Bledsoe reached the same conclusion which the Land Office already had reached—viz: that to take any location or claim out of the general effect of the Taft withdrawal order the law inexorably required that the work must, *in the absence of a valid excuse,* be in actual progress upon the date of the Taft withdrawal. He further held that the mere fact that on August 5, 1909, the company had exhausted its funds and had no money with which to proceed with the drilling, was not an excuse for the failure to be at work on September 27, 1909, which the

Court could take cognizance of. The Court, upon that point, relied upon the case of *Ophir Silver Mining Co.* v. *Carpenter,* 4 Nev., 534.

The doctrine that to constitute a valid excuse for delay in actual work the occasion for the delay must be incident to the work, and not personal to the individual is thus expressed by Judge Hawley in his very able opinion in said case:

> " . . . If it were admitted, however, that his illness constituted a valid excuse for a want of diligence, it would only excuse it whilst such illness continued, which was only for a short time in the early part of 1860. But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at all. Like the pecuniary condition of a person, it is not one of those matters incident to the enterprise, but rather to the person. **The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character."**

Ophir Silver Mining Co. v. *Carpenter, supra.*

It is further to be noted that in said decision Judge Bledsoe lays stress upon the fact that the previous expenditures of the Obispo Company could not be regarded as evidencing due diligence on the date of the withdrawal, for the reason that the outlays had contributed nothing to the discovery ultimately made. He says in this connection:

> ". . . no discovery of oil at any time upon the premises in controversy in the McCutcheon case was made through, or by means of, or at a place developed by, the moneys laid out by the Obispo Company. . . . In this wise it may be said, as I view the situation, that the ex-

penditures of the Obispo Company as heretofore indicated, contributed in no degree or respect to the discovery of oil, *and should not now be held as evidence of due diligence at the time of the withdrawal order.*"

The foregoing decision of Judge Bledsoe is, as already stated, the only one, so far as we are advised, wherein any court has heretofore undertaken to define what constitutes an "existing and valid" claim or location, within the meaning of President Taft's order.

APPELLANTS' SHOWING OF DILIGENCE BRINGS THIS CASE CLEARLY WITHIN THE FOREGOING RULES.

We have now given to the Court such assistance as we can from the cases which deal with particular facts. We shall under this head assume that the Court accepts our interpretation of the words "locations or claims existing and valid," used by President Taft in the withdrawal order.

If the undisputed facts now before this Court are such that if this were a suit filed by us on September 27, 1909, to eject or enjoin an intruder who had effected a hostile entry upon that date, we would be entitled to judgment, it follows *a fortiori* that we have made out our present case. **This, we insist, is the sole test by which our right is to be determined.**

Summary of the Rules Wherewith to Measure the Facts.

The result of the foregoing presentation of authority is that in all of the oil cases thus far decided the

courts have followed the general principles declared in *Ophir Silver Mining Company* v. *Carpenter,* 4 Nev., 534, and the following is, we submit, a fair summary of the law wherewith our conduct is to be measured:

To constitute a claim which the Court would have protected against intrusion—and hence to constitute a valid and existing claim such as President Taft intended to protect—the occupant must have been on September 27, 1908, using "such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time"; he must have been performing an act or series of acts to effect a discovery "with all practical expedition,—with no delay, except such as may be incident to the work itself." The lack of funds with which to go ahead on September 27, 1909, or any other moving cause that may properly be said to be purely personal to the individual, will afford no excuse for any stoppage of work at or before the said date. The efforts of the claimant need not be "unusual or extraordinary," but are sufficient if they are "ordinary and reasonable." And finally, the activities of the claimant will be held to constitute ordinary and reasonable diligence if notwithstanding the fact that his work or any part of it was not in actual physical progress on September 27, 1909, it appears, nevertheless, that the delay or shutdown at said date was occasioned by circumstances or conditions which

would likewise affect "any person who might be en-
"gaged in the same undertaking, such as the state
"of the weather, the difficulty of obtaining laborers,
"or something of that character."

Topographical and Climatic Conditions.

Before proceeding to discuss the specific acts of diligence upon which we rely, the Court should have in mind the topographical and climatic conditions of the district in which these lands are situated.

The authorities already quoted by us declare the law to be that:

> " . . . what constitutes reasonable diligence must depend largely upon the facts of the particular case. . . . But it may be said that they depend chiefly upon the physical circumstances of the locality, the nature and condition of the region to be traversed, and its accessibility, the length of the season in which work is practicable, the supply of labor, and the magnitude and difficulty of the works necessary."

State v. *Superior Court,* 126 Pac., 945, 953.

Our affidavits—and they are not disputed—make the following showing:

"The whole country is an arid country; almost desert in character, with practically no vegetation and no surface water" (Tr. p. 74).

A well had been sunk to some depth on the section in controversy, prior to September 27, 1909, in a fruitless quest for water (Tr. p. 62).

On the adjoining section (Sec. 1) the Standard

Oil Company, in 1908, had also unsuccessfully bored for water (Tr. p. 85).

The Possible Sources of Water Supply.

The only sources of public water supply available to any portion of the public anywhere in that field during 1909 were two small and very inadequate water systems—one then owned by H. C. Stratton, which was afterwards turned over to the Stratton Water Company, and the other owned by a corporation called the Chanslor-Canfield Midway Oil Company, which system was in fact owned and operated by the Santa Fe Railroad Company (Tr., p. 70).

Neither of these companies had piped their water to a point nearer than several miles from this section (Tr., pp. 73-4); and the very important fact is presented that long prior to September 27, 1909, both of said water companies had already oversold their very limited supplies of water, and that neither of said corporations had water which appellants' predecessor could have purchased during the said year of 1909 (Tr. pp. 70-72, 66, 69, 81, 86, 59-60, 62).

It is also noticeable that the Chanslor-Canfield Company had been compelled to go some twenty-five miles for its scanty supply of water (Tr. 82). In April, 1909, said Chanslor-Canfield Company began the construction of a six-inch pipe line to take the place of its former three-inch pipe line, but when completed it was found that there was not sufficient

water. The sinking of additional wells was begun by said company in October, 1909,—one month after the date of the Taft withdrawal order—but these wells were not in operation until October, 1910; and even then the supply was not materially greater than that furnished by the old line (Tr. p. 83).

The Standard Oil Company, with its enormous resources, had developed a water supply at a distance of twenty-three miles from Taft (Tr. 85). And Taft was about two miles from the property in controversy. It used its pipe line in alternately pumping first oil and then water for use in drilling, but refused to supply third persons with any water (Tr. p. 85).

The appellants' showing admits "that water could "have been hauled in wagons for many miles and "across a country having no roads. It would have "been a physical possibility to have drilled wells in "this manner, but as a practical, commercial proposi- "tion it was absolutely prohibitive" (Tr. 74).

Of other lands situate in this same oil district Judge Bean recently said:

> "The lands in controversy are situate in an arid section of the State, and until late in 1909 or early in 1910, it was difficult, if not impracticable, to obtain water in sufficient quantities for drilling."

United States v. *Midway Northern Oil Co.*, 232 Fed., 232.

The Activities Upon These Lands Evidencing Due Diligence.

In 1909 and prior to the 27th day of September, 1909, this section had been covered by four mining locations under the placer mining laws (Tr. pp. 58, 19, 20, 8, 9).

The Government has not attacked the *bona fides* of any of the locators.

The Pioneer Midway Oil Company was in actual possession under these locations on September 27, 1909 (Tr. pp. 58, 61).

As early as June, 1909, the said corporation had determined to drill at the earliest possible moment at least one well on each of the said claims (Tr. p. 61).

Shortly prior to June 21, 1909, pursuant to the intention thus formed, orders were given to the superintendent of the corporation that a camp be established upon said section for the purpose of drilling such wells (Tr., pp. 61-2).

On said 21st day of June, 1909, contemporaneously with the order to establish said camp, two boilers for use in drilling oil wells on said section were purchased (Tr., p. 61). The superintendent in charge of the property reported on the same date that "as soon as possible" he would establish the camp on the section and would commence the erection of said boilers (Tr., p. 62).

Sometime between June 21st and the 27th day of September, 1909, the boilers so purchased were taken to the section of land in controversy and were deposited at a point near the center of the section at a place where the same, when set up, could be used for drilling wells on all four of the claims (Tr., p. 61). The precise date upon which these boilers were taken to the ground is not clear, but it was probably shortly before the 27th day of September, 1909 (Tr., p. 61).

It also appears that prior to the 27th day of September, 1909, said corporation "caused to be erected on each of said quarter sections of land a dwelling house for its men and a complete standard drilling rig." This drilling rig included a derrick, an engine-house, a belthouse and rig irons (Tr., p. 58).

In the erection of these improvements alone, and apart from all other outlay upon the property the corporation had expended several thousand dollars prior to September 29, 1909 (Tr., p. 58).

A supply of water was, of course, just as essential to the proposed drilling operations as was the derrick, the tools, the fuel, or the necessary labor to operate the rig. In this regard the showing is, that during the year 1909, and prior to the 27th day of September of that year, the manager of said corporation caused a well to be sunk upon the said property with the hope of finding water. This hole was sunk to a considera-

ble depth, but no water was discovered therein (Tr., p. 62).

The manager of the company deposes that he made a constant and diligent effort to secure an adequate supply of water for drilling during all of the period from the completion of said derricks up to the time when the property passed to appellants in March, 1910 (Tr., pp. 59-64).

Also "that during the whole of the said period of "time the Pioneer Midway Oil Company was ready "and willing and had the necessary funds for drilling "a well on each of said quarter sections, and was "diligently and continuously endeavoring to secure "the necessary water so to do, and it was owing to "the utter impossibility of getting sufficient water that "the actual work of drilling was not started" (Tr., p. 60).

And again he says "that the said corporation was "ready, able, anxious, and willing to proceed with "drilling wells upon each of the four quarters of "said section and would have begun the drilling "thereon immediately after said 21st day of June, "1909, but for the said difficulty with water" (Tr., p. 63).

The diligence of the efforts to secure water is, we submit, sufficiently evidenced by the actual sinking of the aforesaid well (Tr., p. 62).

A corroborative circumstance is, that early in 1910, when Mr. Titus inquired of the owners if they would

purchase water for drilling if it were brought in by him and his associates under a project they then were contemplating, he was assured in reply "that they would be only too glad to purchase water from affiant or from any one else who could furnish it to them" (Tr., p. 77).

On the crucial date—September 27, 1909—employees of the corporation were in actual physical possession of each of the four quarters of the section, were actually living thereon, and were performing labor on each of the said four claims in preparation for drilling operations theron, such as clearing away the brush and leveling the ground for the construction of the proposed drilling plants (Tr., p. 63).

To the showing of diligence thus made, we ask the Court to add an inference which from the facts disclosed, is clearly in evidence; viz., that under the circumstances it was a more rational thing for the Pioneer Midway Oil Company to count upon getting water within a reasonable time from one or the other of the said water companies, than it would have been for it to have rushed off to inaugurate the construction of a water system which would not only have been enormously expensive, but the construction of which would in all probability have occasioned an even greater delay in beginning the work of actual drilling. We have already seen that neither of the two corporations which dispensed water to consumers was in a position to sell any water to the Pioneer

Midway Oil Company on September 27, 1909. The obligations of the said corporations were then in excess of their capacities. But here is the point: It is a matter of common knowledge that the hopes and expectations of those who undertake drilling operations in a new oil field for the purpose of discovering oil are very often disappointed. While the water supplies of these two corporations were limited, it was natural to assume that in that field the experience would be the usual one and that now and then a customer would voluntarily drop from the list of consumers, or become insolvent and be dropped for nonpayment. The very fact that there was a waiting list of customers who wanted to get water shows what the expectations of men in that field actually were under the then existing circumstances (Tr., p. 84).

It is shown, moreover, that both of the water companies were during this very period endeavoring to increase their water supplies (Tr., pp. 68, 82-3), and this would give occasion for legitimate hope to those who desired water. The completion of wells resulting in discovery would also have a material effect in releasing water to such companies.

The inference which we ask the Court to adopt is, that a sensible man, exercising reasonable diligence, would properly expect that within a reasonable period of time—probably in the course of a few months at most—he would be able to secure water from one of the two water companies, and it appears that in

fact this is exactly what happened. Within less than six months,—in March, 1910,—permission was obtained from the Union Oil Company "to make a connection with their water line through which they were getting water from the Stratton Water Company" (Tr., p. 64).

The question plainly put is this: Since the law does not require any unusual or extraordinary efforts, but only "that which is usual, ordinary, and reasonable," what course of conduct should a Court exact of the occupant of a mining claim under the conditions here presented? Will the Court say that under the circumstances of this case he must not only have undertaken to bring water on to his claim, however great the expense, but that he must needs have decided upon that course and have commenced active work to bring in such water contemporaneously with the erection of his derricks, and that all of this must be started prior to September 27, 1909? If this course had been pursued in the case at bar obviously water could not have been thereby obtained any sooner than it was in fact obtained. Not only does this seem obvious, but Mr. Titus, a man of very wide experience in such matters, as his affidavit deposes:

> "That as a practical commercial proposition it was impossible to have procured water for Section 2 for the purpose of drilling, at any earlier time than the same was actually procured; that he was thoroughly familiar with all possible sources of water supply during 1909 and 1910 for said locality; and that this affiant does not believe that by any degree of diligence or any expendi-

> ture within the bounds of reason any supply of water sufficient for drilling purposes would have been procured in any manner for Section 2 at any earlier period of time than the same was actually procured" (Tr., pp. 76-77).

We respectfully submit, therefore, that so far as the question of a water supply is concerned, we have made a satisfactory showing of reasonable diligence at the date of the Taft withdrawal order.

It only remains to consider whether or not the other activities shown by the evidence were proceeding with sufficient rapidity upon that date to meet the measure laid down by the courts in the decided cases. Again we ask the Court to bear in mind that the efforts which the law exacts are those only which are "usual, ordinary and reasonable." "That constancy or steadi-" ness of purpose or labor which is usual with men " engaged in like enterprises, and who desire a speedy " accomplishment of their designs," is all that is required.

If it be said that we should have installed machinery even though we had no immediate prospect of getting water with which to operate it, the answer is that such would not have been the usual, or the sensible course. We had brought our plant to a point where it was ready for the tools and machinery, and a few days' work would place it in a condition to start drilling operations whenever we had water. Derricks, belthouses, engine-houses and bunkhouses were complete and ready for the machinery. These

structures were actually used by the Government's witness, Mr. Tryon, in drilling on the property. He arrived on March 15, 1910. He found our improvements. The necessary drilling rig was ordered and purchased shortly thereafter (Tr., p. 52), and notwithstanding the fact that the railroad failed to deliver freight promptly (Tr., pp. 64, 56), and notwithstanding a delay of three weeks in getting water through the pipeline after the line was finished (Tr., p. 64), actual drilling commenced on April 28, 1910 (Tr., p. 64).

It would thus appear that notwithstanding these difficulties and delays all of the machinery was purchased and installed ready for work within a period of less than three weeks.

As between purchasing and setting up machinery which might, owing to the difficulty of procuring water, lie idle and suffer deterioration through an indefinite period, and postponing the actual drilling operations for about two weeks, there can be no dispute, we think, as to what is the sensible thing for a man to do "who desires to complete his work within a reasonable time." The setting up of the machinery includes the preparation and leveling of the land. The Government's own affidavit thus shows that the plant had been brought to a point where a very small amount of work extending over a few days served to get it ready for active operations. There was nothing that could not be easily gotten ready by the

time that the water was on the ground. In this connection the action of the Supreme Court in holding the following instructions to be a correct expression of the law, is in point:

> "7. The law does not require a vain or useless thing to be done; that therefore the plaintiffs were not required by the law of due diligence. to complete their ditch before they could successfully use it for the purpose for which they dug it.
>
> "8. If the tunnel through the ridge was a necessary part of the plaintiffs' ditch, without which it could not be used, then it was only necessary for the said plaintiffs to complete their said ditch by the time they could, with reasonable diligence, succeed in preparing their tunnel for use."

Kimball v. *Gearhart,* 12 Cal., 27, 30.

The foregoing considerations, we respectfully insist, amount to a demonstration so convincing as to scarcely leave open to argument what the judgment of a court must needs have been if on September 27, 1909, we had come into court to protect our possession against an intruder. That we could have maintained ejectment upon this showing, or that an injunction would have been granted to restrain the intruder, seems to us the only possible course for a court to have pursued. Once this conclusion is reached, it follows, as we have seen, that this land was excluded from the Taft withdrawal order by the force and intent of the President's language.

II.

RIGHTS OF APPELLANTS AS MEASURED BY THE PICKETT BILL.

If actual discovery of oil or gas is not essential to the validity and existence of a location or claim within the meaning of the words of the Taft withdrawal order, it follows from the preceding discussion that these appellants have no occasion to invoke the remedial clause of the Pickett Bill.

But if this Court shall hold that all locations or claims within the designated area not already perfected by discovery on September 27, 1909, were wiped out by said order, no matter how diligent the occupant may have been, then appellants may nevertheless turn for relief with complete confidence to the said act of Congress of June 25, 1910.

The remedial proviso in the Pickett Bill reads as follows:

> "Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

Whatever else may be the scope of this Act, it is very obvious that it extends to all cases where at the date of the Taft withdrawal order there was an actual occupation of the oil or gas bearing land, accom-

panied by a diligent prosecution of work leading to discovery of oil or gas; for the Act deals expressly with cases of the particular class upon which there was or should be no discovery at the date of the withdrawal.

The said Act has a much wider scope than is thus indicated, but it is not our purpose to go into that matter here. It is enough so far as the case before the Court is concerned, that the Act in question extends its protection to claimants who were in actual possession when the Taft withdrawal was made, and who at said date were exercising the proper diligence to discover oil.

There is, we think, no difference of opinion between appellants' counsel and the learned Attorney General as to the effect of the Pickett Bill upon unperfected claims where the claimant was in actual possession; for in his letter of April 12, 1916, addressed to the Secretary of the Interior, the learned Attorney General says:

> "These persons under the existing law were entitled to enter upon the public lands, to survey and mark the portions desired, to explore for oil and gas, and upon discovery to take title ultimately by patent. So long as they were diligently and in good faith engaged in prosecuting the work of discovery they were entitled to possession and to protection against clandestine and hostile entry by others. *Miller* v. *Chrisman* (140 Cal., 440; 197 U. S., 313); *McLemore* v. *Express Oil Co.* (158 Cal., 559); *Borgwardt* v. *McKittrick* (164 Cal., 650).
>
> *"The proviso to the Pickett Act protected this explorer's right from the order of withdrawal to the same extent and upon the same conditions as it was protected by pre-existing law against private intruders."*

We are in full agreement with counsel for the Government upon this point so far as our claims are concerned. In the foregoing pages we have shown that the possession and diligence of appellants' predecessor in interest were such at the date of the withdrawal order that said predecessor would have been protected against private intruders by the pre-existing law. It only remains, therefore, to show that appellants have complied with the further provision of the Pickett Bill which requires that the claimant shall continue in diligent prosecution of work leading to discovery in order to prevent a lapse of his rights.

THE ACT REQUIRES THAT DILIGENCE AT THE DATE OF THE TAFT WITHDRAWAL ORDER BE COUPLED WITH LIKE DILIGENCE AFTER THE PASSAGE OF THE ACT.

The language of the Act is that the rights of claimants or occupants belonging to the designated class "shall not be affected or impaired by such order so "long as such occupant or claimant shall continue "in diligent prosecution of said work."

It is to be particularly noted that Congress has exacted nothing from the person in possession at the date of the Taft withdrawal, in the way of diligence during the period which passed between said date and the date of the Pickett Bill itself. The Act requires that there shall have been the necessary diligence at the date of the order, and it further requires, so far as withdrawals theretofore made are concerned, that

after the passage of the act the claimant "shall continue" to exercise like diligence or suffer the penalty of having his rights lapse and his claims fall back into the withdrawn area.

There was an obvious propriety in the provision as thus framed. For it would have been a singular anomaly had Congress undertaken to penalize the claimant who obeyed the order of withdrawal, and stopped his work, while it placed a premium upon the conduct of the claimant who defied the executive authority.

When the Taft withdrawal order was made, the claimant in possession was confronted with a choice of several courses. If he believed the order to be valid and binding upon him, his obligations as a law-abiding citizen demanded that he close down his work and surrender his possession to the Government. If on the other hand, he labored under the belief that the order was without any validity whatever, then in all likelihood he would disregard it and proceed to carry on his efforts to discover oil. And finally, if he were doubtful as to the President's authority to withdraw the land, and yet regarded the order, as its phraseology would justify, as a mere temporary withdrawal at most, he might conclude to shut down work, remain in possession, and thus endeavor to preserve the *status quo* until Congress should act or until the question of the President's power in the matter should be finally settled.

It is not conceivable that Congress could have intended to penalize those claimants who did not openly dispute and defy the Presidential authority. Language of the most unequivocal character only, would justify the imputation of such an intent to the framers of the Pickett Bill. But here such a construction not only leads to ridiculous results, but it is not grammatically possible. Congress has not said, even by remote inference, that the rights of a claimant under an order of withdrawal theretofore made shall be protected, provided he *shall have* continued in diligent prosecution of said work from the date of the withdrawal. On the contrary, the phraseology looks to the future only, and expressly declares that the rights of the designated class of occupants or claimants shall not be affected or impaired "so long as such occupant or claimant *shall* continue in diligent prosecution of said work"—a phraseology which, so far as the Taft withdrawal order is concerned, unequivocally relates to the future conduct of the claimant. Had anything else been intended, the phraseology would not have been that just quoted. It would, on the contrary, have been to the effect that "the claimants' rights shall not be impaired if he shall have continued in diligent prosecution of said work from and after the date of the order."

The said Act, therefore, is concerned only with the situation on September 27, 1909, and with the period which followed the 25th day of June, 1910. The

showing of appellants covers this period, but we shall here deal only with the situation of September 27, 1909, and with that on and after June 25, 1910.

As already pointed out, the affidavits before the Court make it clear that on September 27, 1909, appellants' predecessor, Pioneer Midway Oil Company, was occupying these claims and within the meaning of the law of due diligence, was in the diligent prosecution of work leading to discovery of oil or gas. These facts we have discussed and established in the foregoing pages (see pp. 30-43).

CLAIMANTS' SHOWING OF DILIGENCE AFTER THE PASSAGE OF THE PICKETT BILL.

We do not understand that our diligence on and after June 25, 1910, is questioned by the Government. Actual drilling was in progress on the southeast quarter of said section before the 28th day of May, 1910, and on the southwest quarter on the 20th day of June, 1910 (Tr., p. 53). The necessary tools and machinery for drilling the well on the northwest quarter began to arrive in the month of June, 1910, and actual drilling operations began on the 25th day of July, 1910 (Tr., p. 54). Tools and supplies arrived for the well on the northeast quarter from time to time in June, and during the last of June or the first part of July, 1910, the actual work of equipping the drilling rig began, and actual drilling operations began on the 5th day of September, 1910.

The Government relies upon the evidence of Schuyler G. Tryon, who from the beginning superintended all of the drilling work and who remained in charge thereof until sometime in 1911. The Government itself makes the following showing in Mr. Tryon's affidavit:

> "That during the entire time that affiant was in charge of drilling operations on said Section 2, the said drilling operations proceeded with all possible diligence and all said wells aforesaid were drilled as expeditiously as possible under existing conditions as to water and delivery of freight" (Tr., p. 56).

The Government has also offered an affidavit showing that at the time of the commencement of the action there were ten completed wells upon the property (Tr., p. 57).

That the work has been prosecuted diligently since the passage of the Pickett Bill is therefore clear.

It follows that the Pickett Bill fully protects our rights—even if our lands were for a time withdrawn by the Taft withdrawal order.

DECISIONS INTERPRETING THE PICKETT BILL.

There are two decisions which it may be well to call to the Court's attention before we leave this subject.

In a case entitled *United States* v. *Ohio Oil Company,* which arose in the United States District Court for the District of Wyoming, the Court had before it the following facts:

The lands involved were embraced in a withdrawal order dated May 6, 1914. They had been located early in the same year. In April, 1914, representatives of the locators and of defendant company together "examined the lands." In the last part of April, 1914, defendant corporation took an oral agreement to lease the claim and agreed thereby to proceed with the drilling of wells. The defendant company "at once" employed one Virgil Jackson and "left him in charge of the claims." This it will be noted was in the last part of April. On May 4, 1914, —two days before the withdrawal order there in question was made—the defendant corporation directed that certain materials owned by it and stored at Casper be loaded on the cars for shipment to Kirby, the nearest railroad point. On the same day lumber was ordered to be delivered on the lands and "a carpenter was employed to construct certain necessary buildings." On May 5th a contract was entered into with a man to drill wells on the claim in controversy. Pursuant to this oral contract of lease the Court finds that the defendant had "expended and obligated" itself for materials necessary to the work of drilling wells on the two claims in controversy, in the sum of $2,000.00 or more. This was one day before the order was made. It would seem that on May 6, 1914, a temporary camp had been established on the property. The proceedings had arrived at the stage we have indicated when the withdrawal order

became effective. Not until May 7th,—one day after the withdrawal order was made,—did any of the materials previously ordered arrive, and not until then was the construction of anything,—not even a permanent camp,—begun. Upon the foregoing facts Judge Riner held:

> "That the defendants were *bona fide* occupants and claimants of the oil bearing lands in controversy and were engaged in the diligent prosecution of the work leading to the discovery of oil in commercial quantities on said lands at the date of the withdrawal order made by the President, to wit: the 6th day of May, 1914."

United States v. *The Ohio Oil Company, et al.*,
Suit No. 852 (District of Wyoming).

A recent case which seems to call for some comment arose in the Southern District of California. In *United States* v. *Midway Northern Oil Company*, 232 Fed., 619, Judge Bean was confronted with the following facts:

> "No discovery of oil had been made on any of the lands at the date of the first withdrawal order, nor was any one in possession thereof at that time actually engaged in work looking to a discovery . . . nor any work done thereon, except some so-called assessment work, which consisted in excavating sump holes, building small cabins, and the erection of a couple of derricks on one of the tracts, which derricks were never used or equipped for drilling, but were subsequently taken down and removed to other parts of the premises" (p. 623).

The learned Judge says regarding the proviso in the Pickett Bill (italics ours):

"To come within this provision it is essential that the party claiming the benefit thereof was a *bona fide* occupant or claimant at the date of the withdrawal, and at that time in diligent prosecution of work leading to a discovery. Now, the evidence shows, and it is undisputed, that the defendants in none of the cases were engaged in the prosecution of work leading to discovery of oil or gas at the date of the first withdrawal order, *or in fact doing any work at all. Indeed, no work had been done on any of the tracts for months prior to the order, and then only so-called assessment work,* which was of no effect as against the government, since assessment work must follow, and not precede, discovery" (p. 625).

"The lands in controversy are situate in an arid section of the State, and until late in 1909 or early in 1910 it was difficult, if not impracticable, to obtain water in sufficient quantities for successful drilling; but I do not think that fact brings the cases within the terms of the law.

"There is no intention manifest in the statute, as far as I can see, to protect or confer any rights on those who had *merely* made a filing prior to the withdrawal order, but who were unable to engage in work looking to discovery, but only those who were at the date of the order *bona fide* occupants or claimants of the lands withdrawn and *actually engaged in the diligent prosecution of such work.*"

"Now, *the mere effort,* however diligent, to obtain water for drilling purposes, or the inability to do so, which is all the evidence for the defendants tends to show, cannot be held to constitute diligent prosecution of work looking to discovery any more than the pursuit of capital to prosecute such work, or a lumber pile or unused derrick, can be held to constitute such diligence. *The question is not whether the defendants were able to prosecute the work of discovery at the date of the withdrawal order, but whether they were actually engaged in such work at that time*" (p. 626).

United States v. *Midway Northern Oil Co.*, 232 Fed., 619, 626.

[We ask the Court to bear in mind that it is not essential to the purposes of the case at bar that we take issue with the foregoing conclusions of Judge Bean. The showing of these appellants is that upon the very date of the withdrawal order a crew of men employed by the claimant was upon the property in controversy and was actually engaged in the prosecution of work necessary to the proposed drilling operations. Ours, in other words, is not a case where the work was not literally in progress on the said date.

Nor are we to be understood as here questioning the correctness of Judge Bean's ultimate conclusion upon the facts before him in the cases to which his opinion is addressed.]

The substance of Judge Bean's conclusions, if we correctly appreciate his words, is that the act does not protect those who have merely made a paper filing; who at the date of the withdrawal had never done any actual work whatever leading to a discovery of oil; who for months prior to the withdrawal order had done no work of any kind whatever upon the tract; and who never at any time had attempted to do any work or erect any improvements thereon other than in the way of assessment work; and where it could not even be said that such assessment work had contributed in any manner toward a discovery of oil or gas. And he further holds that claimants who make a showing no better than the foregoing cannot be excused by proof that it was difficult or impracticable or perhaps impossible to obtain water with which to drill. And that no "mere effort," however diligent, to obtain water, or even an

inability to obtain it, will of itself, when coupled only with a paper location and some so-called "assessment work," constitute "diligent prosecution of work looking to discovery," within the meaning of the Act. By "*mere* effort" to obtain water, we understand the learned Judge to mean an attempt by word of mouth or other negotiation unaccompanied by any physical undertaking either upon the land or elsewhere. We do not think he intended to hold literally that an effort to bring water on the property would be entitled to no consideration in any case. In short, work of building a long but uncompleted pipe-line or the sinking of an unsuccessful water well would not be held to be "mere" effort within the learned Judge's meaning, if we correctly apprehend him. Nor do we think that he intended to be understood as indicating that where parties are in possession and actually at work preparing their claims for drilling, and where they have placed the necessary structures on the ground, evidence of diligent effort by negotiation to obtain water coupled with the physical impossibility of obtaining it at the moment, would not be circumstances tending to show that there was no lack of diligence in beginning operations, and so to excuse any seeming tardiness in starting to drill—particularly if it be shown that water was obtained and that drilling began within a period of time reasonable under all of the conditions.

So interpreted we have no occasion on this appeal to find fault with Judge Bean's decision.

It is not possible, we think, that the learned Judge can have intended to hold that under no circumstances, and regardless of elaborate preparations, improvements, outlays and activities upon the property, a failure to have secured a water supply by the 27th day of September, 1909, deprives claimant of protection under the Act; for he himself adopts as a correct exposition of the law the following expressions of Judge Hawley in *Ophir Silver Mining Company* v. *Carpenter,* 4 Nev., 534, 538:

> "The Supreme Court of Nevada, in *Ophir Silver Mining Company* v. *Carpenter,* 4 Nev., 538, 97 Am. Dec., 550, after saying, 'Diligence is defined to be the "steady application to business of any kind, constant effort to accomplish any undertaking,"' adds:
>
> "It 'is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs; such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, **except such as may be incident to the work itself.**'"

United States v. *Midway Northern Oil Co.,* 232 Fed., 619, 626.

And Judge Bean could hardly have overlooked the fact that Judge Hawley goes on in the same opinion to define the sort of delays which are properly "incident to the work" as follows:

> "But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at

> all. **Like the pecuniary condition of a person, it is not one of those matters incident to the enterprise, but rather to the person.** The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, **such as the state of the weather, the difficulty of obtaining laborers, or something of that character."**

Ophir Silver Mining Co. v. *Carpenter,* 4 Nev., 534, 97 Am. Dec., 550, 555-6.

Delay in operations resulting from the utter impossibility of obtaining at the moment any essential to the work of drilling, such as machinery, or fuel, or water, would obviously bring the case within the foregoing rule. It thus seems clear that Judge Bean did not intend to narrow Judge Hawley's expressions.

Judge Hawley's views as thus expressed are statements of an established principle. Thus in an early California case (1859) the following instruction was held to be a correct expression of the law:

> "That in determining the question of plaintiffs' diligence in the construction of their ditch, the jury have a right to take into consideration the circumstances surrounding them at the date of their alleged appropriation, such as the nature and climate of the country traversed by said ditch, together with all the difficulties of procuring labor and materials necessary in such cases."

Kimball v. *Gearhart,* 12 Cal., 27, 30.

So also in *Sand Point, etc. Co.* v. *Pan Handle Dev. Co.,* 83 Pac., 347, 349, it was contended that the defendant who had taken up a water right in December, 1902, and who had not completed his ditch in Feb-

ruary, 1904, did not show due diligence. But the Court said:

> "It seems to us, however, when we consider that this work was being prosecuted in a mountainous section of the State where there is a very heavy snowfall and a long winter season with much rough and stormy weather which would interrupt and delay the character of work that was being carried on, that the amount and kind of work which is shown to have been done evidences good faith, reasonable diligence, and a purpose to complete the work and apply the waters to the beneficial use designated."

Many other illustrative cases might be cited to the same effect.

These authorities, coupled with the remedial character of the Pickett Bill, and the absence of any expression in the bill itself which indicates that the word "diligent" is to have other than its usual meaning, lead us to the conclusion that the Pickett Bill makes the usual allowance for delays incident to the work itself.

Like all remedial statutes the Pickett Bill is entitled to a liberal interpretation. That said bill was framed and intended for the protection of all such occupants of public lands as would have been protected by the courts on September 27, 1909, had a controversy arisen between individuals claiming adversely, has not been supposed to be open to doubt, for the learned Attorney General himself says in his letter to the Secretary of the Interior, dated April 12, 1916:

> "The proviso to the Pickett Act protected this explorer's right from the order of withdrawal to the same extent

and upon the same conditions as it was protected by pre-existing law against private intruders."

This calls for the usual rule of diligence as laid down by Judge Hawley in the passages hereinabove set forth.

IN CONCLUSION.

When the Government submits itself to the jurisdiction of its courts, its position is that of any other suitor. The Courts of the United States sitting in equity will no more depart from the established doctrines of jurisprudence in response to the demands of the Government than they will in the case of the humblest suitor. If this be not true, then repeated judicial declaration to that effect is a mockery and a farce. For example see:

United States v. *Grand Rapids Co.,* 154 Fed., 136;
United States v. *Grand Rapids Co.,* 165 Fed., 297;
United States v. *C., M. & St. P. Ry.,* 207 Fed., 179;
Hemmer v. *United States,* 204 Fed., 898.

One of the settled doctrines of Chancery is that:

". . . courts do not lightly enjoin parties from operating properties in their possession, nor appoint receivers to take property out of their possession. *Nevada Sierra Oil Co.* v. *Home Oil Co.* (C. P., 98 Fed., 674; 20 *Am. and*

Eng. Enc. Law, pp. 18, 21, and cases there cited). The fundamental question in every suit in equity is, on which side is justice?"

Cosmos, etc. Co. v. *Gray Eagle Co.,* 104 Fed., 32.

". . . the power of appointing receivers is one which should be sparingly exercised, and with great caution and circumspection, and only where the circumstances relied upon to warrant the appointment are made to appear by clear proof."

24 *Am. & Eng. Encyc.,* 1038.

If we are correct either in our interpretation of the Taft withdrawal order or in our construction of the Pickett Bill, it follows, we respectfully insist, that the Government has made no showing which justified the action of the Court below. Our affidavits are not only not in contradiction with those filed in behalf of the Government, but the latter tend to support them in important particulars. These affidavits, as we have shown, disclose a state of facts upon which any court of competent jurisdiction must needs have protected the possession of appellants' predecessor in interest from any form of hostile interference by private intruder. Such a showing necessarily means that if nothing else appears upon the trial, these appellants—and not the Government—will be entitled to judgment.

The decisions may be searched in vain for a case where any court upon such a state of facts has held the appointment of a receiver to be proper. It surely

will not be claimed that solely because the Government is the plaintiff, the wholesome rules of equity are to be departed from and the appointment of a Receiver made as a mere matter of course!

It will be noted that even if no possible harm could come from such an action it nevertheless could not be justified.

> "The appointment of a receiver will never be made merely because the measure will do no harm. Nor, *a fortiori,* will a receiver be appointed where no perceptible benefit would result therefrom, and no apparent injury from a refusal to appoint."

23 *Am. & Eng. Encyc.,* 1038-9.

But in the case at bar it is not conceivable that no harm can result. When a going concern of the proportions of appellant corporation is thrown into the hands of a Receiver harm inevitably results.

It is further to be noted that it is a general rule that:

> "The reluctance of the courts to appoint a receiver is particularly emphasized where such measure would constitute an interference . . . with the possession of a party under apparent claim of right, *and such reluctance may be increased where the defendant's possession had been long continued.*"

23 *Am. & Eng. Encyc.,* 1039.

If a court will ever feel reluctant to make such appointment where the defendant's possession has been long continued, we very respectfully, but very emphatically, urge that the case at bar is pre-eminently

one of that character. The appellant corporation was organized in 1909, owned and operated its patented lands for oil, and did not enter into a contract to purchase the land in controversy for several years thereafter. It had been so operating its properties for several years when in July, 1913, it entered into possession under a contract with the other appellants. It has expended $700,000.00 in the development and improvement of the property. Its predecessors had expended $200,000.00, and appellant corporation has paid $500,000.00 on account of the purchase price of these lands. These facts all appear in the record at pages 70 to 81 inclusive.

There is no suggestion or claim that the corporation is insolvent or could not upon an ultimate accounting properly respond to any just claims of the Government for oil extracted *pendente lite.*

The following very significant statements in the affidavit of Mr. Titus are before the Court and there is no attempt at contradiction:

> "That the occupation of the said Section 2 by the said North American Oil Consolidated and its predecessors in interest were and have been at all times open, notorious and were at all times actually known to the Land Department of the United States Government and that whatever activities in the way of development and improvement of the said property have taken place were with the full knowledge of the officers and agents of the Land Department of the United States. That during all of the said period of time the said North American Oil Consolidated has given to the agents of the Land Department free access to its books and records of all kinds and the said United States Government has at all times during the said period had actual reports and knowledge of the improvements

that the said corporation was making upon said property, and has had access to the books and papers of said corporation showing the amount of oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of its equipment and the disposition of its oil supply.

"That during all of the said time the plaintiff through the officers and agents of its Land Department has had actual knowledge that the defendant, North American Oil Consolidated, was in possession of the said property under a claim of right, and it has during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid expenditures of money and to extract oils from said properties and to incur obligations in and about the development of said property, and to develop the said property to its present condition and to extract therefrom the very oil the value of which it is here seeking to recover."

(Tr., pp. 78-9.)

Is it possible that a private individual, who makes no showing that the occupant of the land is insolvent, and who without offering any excuse has stood by during a period of years while nearly one and a half millions of dollars are being expended by the occupant on the property, would be permitted to come into a court of conscience and upon a showing of ultimate right as doubtful as the Government has here made, be permitted to wrest the property from the occupant's custody and possession, especially if the occupant is actively conducting a great business thereon? We respectfully submit that it simply is not conceivable.

Giving to the decisions which sanction the appointment of a Receiver to restrain waste *pendente lite* their widest scope, they never have gone so far as to

justify a conclusion that if the right of the plaintiff is not absolutely clear, he will nevertheless be entitled to a Receiver for the purpose of preventing waste, notwithstanding the fact that he may have stood by through a period of years and have knowingly permitted the claimant in possession to do the very acts which he now seeks to prevent the continuance of, by placing the property in the hands of a receiver.

The same view is that if the plaintiff makes no proof that the occupant is insolvent and if he has already waited and watched the operations for several years, he can afford to wait a little longer until judgment is rendered in the suit.

In a recent decision already referred to it is said:

> "Where there is a serious controversy as to the title, and the party in possession is holding adversely, the plaintiff's remedy is at law, and not in equity. *Johnston* v. *Corson Gold Mining Co.*, 157 Fed., 145, 84 C. C. A., 593, 15 L. R. A. (N. S.), 1078. For 'suits in equity shall not be sustained in the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' R. S., §723. *But where the title and right to possession is clear, and the defendant is wrongfully in possession, extracting and removing the mineral contents, thus destroying the very substance of the estate, a court of equity will assume jurisdiction to prevent such waste, and, having done so, will determine the rights of the parties before it.*"

United States v. *Midway Northern Oil Co.*, 232 Fed. Rep., 619, 628.

The foregoing quotation is an expression indicative of the utmost extent to which the authorities go.

We ask in view of the considerations set forth in the foregoing pages that the order appointing a Receiver be reversed and set aside.

Respectfully submitted.

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